Supreme Court, U.S.
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No. 98-22 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF OHIO,

Petitioner,

vs.

TROY MATTHEW TENACE,

Respondent.

On Petition for Writ of Certiorari To
The Supreme Court of Ohio

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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48 pp

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Troy Matthew Tenace, through undersigned counsel, asks leave to file his Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs or fees and to proceed in forma pauperis pursuant to Rule 39.

Undersigned counsel has represented respondent throughout the direct appeal process as appointed counsel since respondent has, at all previous times in this case, been determined to be indigent.

Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

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No. 98-22

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF OHIO,

Petitioner,

vs.

TROY MATTHEW TENACE,

Respondent.

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

I, Troy Matthew Tenace, being first duly sworn according to law, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed and file my Brief in Opposition to Petition for Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I was entitled to the redress I sought and obtained in the courts below and that I believe am entitled to the only further redress I seek which is to have the Petition for Certiorari denied.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of opposing a Petition for a Writ of Certiorari are true.

1. Are you presently employed? NO.

A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

B. If the answer is no, state the date of your last employment and the amount of the salary or wages per month you received. 1997 : $16.00 /HOURLY - MANSFIELD C.I.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? NO.

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? Yes.

A. If the answer is yes, state the total value of the items owned. $175.00

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property excluding ordinary household furniture and clothing? NO.

A. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any question in this affidavit will subject me

to penalties for perjury.

Troy M. Tenace

TROY MATTHEW TENACE

SUBSCRIBED AND SWORN TO before me this 20th day of July, 1998.

NOTARY PUBLIC

Notary Public
My commission has no expiration
Sec. 147.03 R.C.

No. 98-22

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF OHIO,

Petitioner,

vs.

TROY MATTHEW TENACE,

Respondent.

On Petition for Writ of Certiorari To
The Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

QUESTIONS PRESENTED

QUESTION NO. 1: Is there any federal basis on which a state court may be prevented from determining as a matter of state law that a competent criminal defendant's trial counsel may not withdraw his plea of not guilty by reason of insanity against his express wishes?

QUESTION NO. 2: Is there any federal basis on which a state court may be prevented from determining that error in state law at a state criminal trial was harmful on the principles set out in its state's criminal rules and thereby reversing the defendant's conviction and remanding the case for a new trial?

QUESTION NO. 3: Is there any federal basis on which a state court may be prevented from determining that, under state law, circumstances may result in a breakdown of the attorney-client relationship of such magnitude that continued representation would abrogate the defendant's right to effective assistance of counsel?

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STATEMENT OF JURISDICTION

Jurisdiction in this case is improper under 28 U.S.C. § 1257 because, although respondent asserted in the court of appeals a federal basis for the relief obtained, the relief he actually received was not grounded in federal constitutional statutory, or decisional law.

STATEMENT OF THE CASE

Respondent, Troy Matthew Tenace, was charged by an Ohio grand jury sitting in Lucas County, Ohio with, among other things, aggravated murder and a death specification under the laws of the State of Ohio. He was tried before a jury in the Court of Common Pleas of Lucas County, Ohio. Immediately at the start of trial and after Mr. Tenace had been adjudicated competent and against his expressed and on-the-record wishes, trial counsel withdrew Mr. Tenace's previously entered plea of not guilty by reason of insanity ("NGRI"). Mr. Tenace was found guilty of the charges and specification, and sentenced to die. On appeal to the Court of Appeals of Lucas County, Ohio, Sixth Appellate District, Mr. Tenace raised twenty assignments of error. The court of appeals, determining that the first assignment of error was dispositive, reversed the judgment of the trial court and remanded the case for

a new trial. The court's opinion recites no basis in, and does not rely upon, federal law for its decision.

Petitioner, State of Ohio, sought review in the Supreme Court of Ohio which declined to hear the case finding that it presented no "substantial constitutional question." (Appendix, A-22.) Petitioner sought reconsideration which was, in turn, denied. Petitioner then filed the present Petition for Writ of Certiorari.

What is evident from this brief recitation is that petitioner wrongly denominates this a "capital case" and wrongly invokes the jurisdiction of this Court. This is not a capital case pursuant to Rule 14.1(a) because neither petitioner nor respondent is currently under a sentence of death. And the jurisdiction of this Court is not properly invoked because the opinion of the court of appeals in this case is not grounded in federal statutory, constitutional, or case law.

REASONS FOR DENYING THE WRIT

A. Petitioner misrepresents this as a capital case.

Rule 14.1(a) of the Rules of the Supreme Court of the United States provides, in relevant part, that "[i]f the petitioner or respondent is under a death sentence that may be affected by the dispostion of the petition, the notation 'capital case' shall precede the questions presented." In this case, petitioner has

placed that notation before the questions presented.

However, and although he once was, Mr. Tenace is not currently under a sentence of death. The judgment of the court of appeals which reversed the judgment of the trial court and remanded this case for a new trial had the effect of vacating Mr. Tenace's death sentence. In its current posture, this is no more than a run-of-the-mill criminal case.

B. There is no federal question properly presented in this case to invoke the jurisdiction of this Court.

It is true, as petitioner suggests in its jurisdictional statement, that Mr. Tenace did, in arguing his first, and dispositive, assignment of error in the court of appeals, assert that his rights under the Constitution of the United States (aand also under the Constitution of the State of Ohio) were violated. However, the court of appeals, in its opinion, did not address any constitutional matter except in passing.[1]

The court's opinion does reference two cases from the federal courts in which questions akin to the one before it were decided in light of certain constitutional provisions. Weber v. Israel, 730

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[1]The court stated, in the penultimate paragraph of its opinion, that "appellant was deprived of the right to effective assistance of counsel," perhaps thereby referencing the Sixth Amendment by implication. (Appendix, A-20.)

F.2d 499 (7th Cir.), cert. denied, 469 U.S. 850 (1984)(Appendix A-14); Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956 (1984)(Appendix, A-16)[2] And the court discussed Alvord at some length, quoting particularly from the words of Justice Marshall's dissent from the denial of certiorari in that case. (Appendix A-18 - A-19.) However, the focus of the court's consideration was never on federal questions.[3]

Rather, the court asked whether a competent defendant had a personal right to determine whether to proceed to trial on an NGRI plea. Mr. Tenace does believe and did argue below that the Sixth Amendment requires this conclusion. However, the court of appeals found no need to address the question under the authority of either the federal or state constitution. Nor should it have, given Ohio's well-established rule that courts should not address constitutional questions unless they are required to. See, e.g., State ex rel. Liveux v. Westlake, 154 Ohio St. 412, 415 (1951); Christensen v. Bd. of Commrs. On Grievances and Discipline, 61 Ohio

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[2]There is also an embedded citation to language from Frendak v. United States (D.D.C. 1979), 408 A.2d 364. (Appendix, A-15.)

[3]Moreover, and although the quotation is from the dissent, the decision in Alvord is entirely consistent with the decision in this case. Alvord held that a criminal defendant is not denied effective assistance of counsel when his trial attorneys **obey** his instructions regarding an NGRI plea.

St.3d 534, 535.

The case most consistently and firmly relied on by the court of appeals, the only case cited directly on point, and the only case from which the court determined that prejudice flowed under the Ohio Rules of Criminal Procedure is State v. Turner, slip op. No. 6536, Court of Appeals of Medina County, Ohio, Ninth Appellate District (Sept. 17, 1980) (Appendix F to Petition for Writ of Certiorari). Similarly, the case on which petitioner most strongly relied below and which it has most extensively cited here is State v. Smith, 3 Ohio App.3d 115 (1981), a local Ohio case which, like Turner, was resolved without reference to federal law.

C. There is no federal problem with a state court's determination that a competent criminal defendant is entitled to pursue a plea of not guilty by reason of insanity.

Petitioner asserts that the "difference of opinion" between Mr. Tenace and his trial counsel is no more than a difference in trial strategy as to which counsel's decision should be controlling. Regardless of whether the federal courts would find, as a matter of federal law, that an NGRI plea is a strategic choice, the court of appeals of Ohio determined that the choice of such a plea is a matter of fundamental Ohio law. That is not a question reviewable by this Court. E.g., Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945).

Moreover, and if the question were somehow reviewable, the outcome would properly be the same.

It is, of course, settled law that the right to enter the plea of choice is personal to a defendant. See Boykin v. Alabama (1969), 395 U.S. 238. Petitioner urges the position that, whatever its scope, that right does not include the right to an NGRI plea. More specifically, petitioner urges this Court to reach the largely meaningless and ambiguous holding "that a defendant's trial counsel may (generally or in limited situations) withdraw a NGRI plea over the objection of the accused." (Petition at 19.)

Mr. Tenace agrees that there are circumstances where trial counsel may withdraw such a plea. Trial counsel may act where the defendant defers to counsel's judgment. Trial counsel may act where the defendant has or expresses no view of the matter. Trial counsel may act where defendant is not competent to choose his plea.

Mr. Tenace does not agree, however, that trial counsel may withdraw an NGRI plea against the express wishes of a criminal defendant who has been adjudicated competent.

Nor did the American Bar Association which set forth as Standard 4-5.2(a), Standards Relating to Criminal Justice: Defense Function Standards (3 Ed. 1993), the rule that the choice of plea

is "to be made by the accused after full consultation with counsel."

Nor does anyone else. Indeed, petitioner has not, in any proceeding, cited a single case from any jurisdiction holding that counsel may against the express wishes of a competent client withdraw a previously entered NGRI plea. There are no cases to that effect because the proposition is self-evidently wrong.

D. The determination of whether an error in state law is harmful or harmless is a matter left to the court's of that state to resolve.

Petitioner wishes this Court to determine whether, if the court of appeals properly found that trial counsel's conduct was improper, the court of appeals rightly applied Ohio law in determining that the error was harmful and required that Mr. Tenace be afforded a new trial. This is a matter exclusively within the province of the Ohio courts to resolve. See Herb v. Pitcairn, supra. Indeed, petitioner has not even suggested a theory under which this Court might properly undertake a correction of the harmless error analysis employed in this case.

Moreover, the analysis was simple, correctly applying Ohio's own law. Ohio R. Crim. P. 52(A), defining "harmless error," states, in its entirety:

> Any error, defect, irregularity, or variance

> which does not affect substantial rights shall be disregarded.

The court of appeals held that "the right of a defendant who is competent to stand trial, but who insists he was insane at the time of the crime, to choose what plea to enter is a substantial right." (Appendix A-19.) That unexceptionable conclusion, petitioner complains, somehow requires a more "sufficient explanation." Rather, and entirely without explanation or justification for why it is necessary, petitioner insists that a some sort of balancing test is required to determine whether the rights at issue are "substantial."

But certain categories of error have always been recognized as so fundamental that they require automatic reversal. In Arizona v. Fulminante, 499 U.S. 279 (1991), this Court distinguished

> "trial error" - error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively. . . assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt,

id. at 307-308, from

> structural defects in the constitution of the trial mechanism, which defy analysis by "harless-error" standards . . . [and affect] "[t]he entire conduct of the trial from beginning to end."

Id. at 309. Such defects, "transcend[] the criminal process." Id. at 311.

Petitioner's real argument is, implicitly, that the desired NGRI defense would likely have failed, so Mr. Tenace should not have had the opportunity to make it.

Perhaps the desire to pursue that defense was ill-conceived. But criminal defendants are allowed to make bad choices. See, e.g., McKaskle v. Wiggins, 465 U.S. 168, 177, fn. 8 (1984), where this Court recognized that the right of self-representation "is either respected or denied" but that denial "cannot be harmless" although respecting the right "usually increases the likelihood of a trial outcome unfavorable to the defendant."

Mr. Tenace submits that, whether under federal or Ohio standards, the error in this case would not be deemed harmless.

E. A full and complete breakdown of the attorney-client relationship compels the conclusion that the client is denied effective assistance of counsel.

Petitioner insists that this case is really about a modest "difference of opinion" between attorney and client. And were that all this was about, petitioner would be right that there was not "'a breakdwon in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel.'" State v. Coleman, 37 Ohio St.3d 286, 292, cert. denied,

488 U.S. 900 (1988), quoting People v. Robles, 466 P.2d 710, 717 (Cal. 1970).

But that is not this case. Rather, this is a case where there was an absolute and unbridgeable difference between trial counsel and client regarding the fundamental decision of how to plead and, as a result, what sort of defense to mount. Moreover, as the court of appeals' citations to and quotations from the trial record demonstrate, the NGRI plea clearly was withdrawn in the face of Mr. Tenace's open opposition.

Where **during trial** client and counsel openly and repeatedly dispute not the details of the defense (what questions to ask or objections to make, for instance) but the very defense itself (I did it but I was insane at the time / I didn't do it), the relationship crumbles. They cannot work together for they are at fundamental loggerheads.

F. This case raises no issue worthy of this Court's time and resources.

This case is now, as it has been from the time the court of appeals issued its decision, about a narrow and fact-bound matter. The court of appeals determined that when:

> (1) a criminal defendant who has been found competent asks that trial counsel withdraw and for a ninety (90) day

continuance to retain private counsel who will present the plea and accompanying defense that the defendant wishes, and

(2) the trial court denies that request and forces the defendant to go to trial with attorneys who

(3) against the defendant's express and repeated wishes on the record withdraw his plea of choice, enter another plea on his behalf, and refuse to present the defense associated with defendant's plea of choice,

then (A) the trial court errs in permitting counsel to withdraw defendant's plea of choice; (B) there is a breakdown in the attorney-client relationship of such magnitude that the defendant is deprived of the effective assistance of counsel; and (C) the defendant is denied his substantial right to determine "what plea will be entered to the charges brought against [him]."

(Appendix A-19 - A-20, quoted language from A-20.)

There was, at the time this case was decided, one case in the nation that was cited in briefing by of either the parties or the court of appeals and which was directly on point. State v. Turner, supra. Petitioner points to no additional cases now. Only in Turner was a court faced with a competent criminal defendant who, on direct appeal, argued that his trial counsel violated his

substantial rights by withdrawing an NGRI plea over his explicit and on-the-record objections.

Turner sat on the books for nearly seventeen full years before the court of appeals ruled in this case waiting for some energetic lawyer to raise its issues. And it was ignored. The reason is surely not that Turner is grossly and self-evidently wrong. Lawyers will seek to apply a foolish and ill-considered precedent as readily as a wise one when it advances their client's interests. The reason, evidently, is that the factual predicate of that case occurs so rarely. But narrow legal determination based on a highly fact-specific situation which arises nationally but once every seventeen years is hardly a situation which cries out for review.

Petitioner further suggests that this Court should grant certiorari and hear the appeal because it has never before ruled on the question and because one federal court has found it not ineffective to adhere to a defendant's wishes as to a plea while another found that an attorney could make the decision he wished when the client expressed no opinion on the matter.[4] But it is not, has not been, and should not be, this Court's practice to accept cases simply to answer questions which no one has ever

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[4]The cases are, respectively, Alvord and Weber; both supra.

bothered to ask before.[5]

Petitioner further says that agreeing to hear this case would permit this Court to determine whether the right to an NGRI plea is, as a matter of federal constitutional law, personal and fundamental or a matter of trial strategy left to the discretion of trial counsel. That is so, of course, and it is, again, an issue which simply does not arise in the nation's courts, and, as a matter of federal constitutional law, was not addressed by the deciding court in this case.

Moreover, and while resolution of the issue might collaterally provide, as petitioner suggests, an opportunity to explore the range of decisions counsel may make as opposed to those left to the sole discretion of a criminal defendant, that exploration is neither demanded by this case nor compelled particularly by other needs. Rather, petitioner seems to suggest that if this Court is inclined to render advisory opinions on a variety of tangentially related topics, it could use this case as a means to do so. Perhaps it could. Once again, however, neither history, current practice, nor good policy teach that review ought to be exercised for such reasons.

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[5]And, of course, neither Alvord nor Weber is inconsistent with the decision in this case.

CONCLUSION

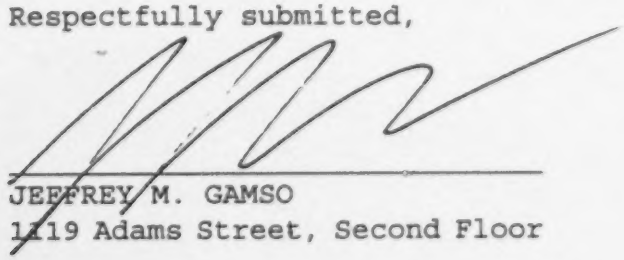
Except to the parties involved, this case is trivial.

The court of appeals, the highest state court to rule on the merits, broke no new legal ground. Rather, it issued a highly fact specific opinion, of little precedential value, in a context which history teaches occurs only very rarely. Further, it reached that decision based entirely on its understanding of Ohio law, a conclusion buttressed by the conclusion of the Supreme Court of Ohio that the case did "not involv[e] any substantial constitutional question." (Appendix, A-22.)

Granting the petition, issuing a writ of certiorari, and ruling on the merits in this case would properly provide a forum for resolution of no significant question, would properly address no federal question, and would serve merely to permit the rendering of an advisory opinion on matters which some attorney or defendant might someday elect to raise in some jurisdiction.

Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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Counsel for Respondent

IN THE COURT OF APPEALS OF LUCAS COUNTY

State of Ohio — Court of Appeals No. L-95-010

Appellee — Trial Court No. 94-5235

COPY

v.

Troy Matthew Tenace — OPINION AND JUDGMENT ENTRY

Appellant — Decided: July 25, 1997

* * * * *

Julia R. Bates, prosecuting attorney, and
Craig T. Pearson, for appellee.

Jeffrey M. Gamso and Larry V. DiLabbio,
for appellant.

* * * * *

HANDWORK, J. This is an appeal from a November 30, 1994 judgment entry of the Lucas County Court of Common Pleas in which the court sentenced appellant, Troy Matthew Tenace, to death. The court accepted a jury verdict that found appellant guilty of aggravated robbery and of aggravated murder with death penalty specifications. The specifications were that he purposely caused the death of another while committing robbery, and that he was the principal offender.

Appellant has presented the following assignments of error for consideration on appeal:

1.

"FIRST ASSIGNMENT OF ERROR
THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE WHEN IT DENIED HIS PRO SE MOTION ASKING THAT TRIAL COUNSEL WITHDRAW AND THAT HE BE GIVEN A CONTINUANCE IN ORDER TO OBTAIN NEW COUNSEL AND WHEN IT PERMITTED TRIAL COUNSEL, OVER APPELLANT'S REQUEST, TO WITHDRAW HIS PLEA OF NOT GUILTY BY REASON OF INSANITY AND REPLACE THAT PLEA WITH A STRAIGHT PLEA OF NOT GUILTY.

"SECOND ASSIGNMENT OF ERROR
APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL, AGAINST HIS EXPLICIT WISHES, WITHDREW HIS PLEA OF NOT GUILTY BY REASON OF INSANITY AND REPLACED IT WITH A STRAIGHT PLEA OF NOT GUILTY.

"THIRD ASSIGNMENT OF ERROR
THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE BY SETTING AN ARBITRARY CEILING OF $7,500 FOR EXPERT ASSISTANCE.

"FOURTH ASSIGNMENT OF ERROR
THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE WHEN IT OVERRULED HIS MOTION TO SUPPRESS.

"FIFTH ASSIGNMENT OF ERROR
THE TRIAL COURT WRONGLY GRANTED THE STATE'S CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR TIMOTHY MOSS.

"SIXTH ASSIGNMENT OF ERROR
THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE STATE'S EXHIBIT 7, A PHOTOGRAPH OF THE DECEASED WHICH DOES NOT REVEAL HOW HE LOOKED AT THE TIME OF THE OFFENSE BUT, RATHER, INDICATE [SIC] HOW HE LOOKED TWO DAYS LATER WHEN HIS BY-THEN-PARTLY-DECOMPOSED BODY WAS FOUND.

"SEVENTH ASSIGNMENT OF ERROR
APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE FAILURE OF THE TRIAL COURT TO INQUIRE WHETHER HE KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO TESTIFY AT TRIAL.

"EIGHTH ASSIGNMENT OF ERROR
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING INDIVIDUALLY TO VOIR DIRE THE JURORS ABOUT APPELLANT'S OUTBURST AND IN NOT INSTRUCTING THE JURORS TO DISREGARD THE OUTBURST. (TR 1317-1328.)

"NINTH ASSIGNMENT OF ERROR
IF ANY ERROR REGARDING THE COURT'S FAILURE TO VOIR DIRE OR INSTRUCT THE JURY ABOUT APPELLANT'S OUTBURST WAS WAIVED BY TRIAL COUNSEL'S FAILURE OT REQUEST SUCH A REMEDY, THEN APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

"TENTH ASSIGNMENT OF ERROR
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT INSTRUCTED THE JURY THAT IT HAD TO REACH A UNANIMOUS DECISION THAT THE AGGRAVATING CIRCUMSTANCE DID NOT OUTWEIGH THE MITIGATING FACTORS BEFORE IT COULD CONSIDER A LIFE SENTENCE.

"ELEVENTH ASSIGNMENT OF ERROR
INSOFAR AS APPELLANT'S TRIAL COUNSEL MAY HAVE WAIVED THIS ISSUE, APPELLANT RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

"TWELFTH ASSIGNMENT OF ERROR
THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF OHIO WHEN IT DENIED HIS MOTION TO DISMISS THE DEATH SPECIFICATION.

"THIRTEENTH ASSIGNMENT OF ERROR
A DEATH PENALTY LAW WHICH HAS NOT BEEN ENFORCED IN OVER THIRTY YEARS IS, BY DEFINITION CRUEL AND UNUSUAL.

"FOURTEENTH ASSIGNMENT OF ERROR
THE DEATH PENALTY IN THIS CASE CAN ONLY BE VIEWED AS FREAKISH, CAPRICIOUS, AND ARBITRARY.

"FIFTEENTH ASSIGNMENT OF ERROR
THE SENTENCE IMPOSED BY THE TRIAL COURT IS ILLEGAL AS VIOLATIVE OF R.C. 2949.22.

"SIXTEENTH ASSIGNMENT OF ERROR
THE TRIAL COURT ERRED IN IMPOSING A DEATH SENTENCE IN THIS CASE BECAUSE THE DEATH PENALTY LAW AS APPLIED IN OHIO VIOLATES R.C. 2929.05(A) BY REQUIRING APPELLATE COURTS AND THE SUPREME COURT, IN CONDUCTING THEIR R.C. 2929.04(A) REVIEW OF 'SIMILAR CASES' FOR PROPORTIONALITY, TO REVIEW ONLY THOSE IN WHICH A SENTENCE OF DEATH WAS IMPOSED AND IGNORE THOSE IN WHICH A SENTENCE OF LIFE WITHOUT PAROLE ELIGIBILITY AFTER TWENTY FULL

YEARS OR LIFE WITH PAROLE ELIGIBILITY AFTER THIRTY FULL YEARS WAS IMPOSED. THE CURRENT METHOD ALSO VIOLATES THE RIGHTS TO FAIR TRIAL AND DUE PROCESS AND RESULTS IN THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT AS SET FORTH IN THE FIFTH, SIXTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IN SECTION 1,2,5,9,10,16, AND 20, ARTICLE I OF THE OHIO CONSTITUTION.

"SEVENTEENTH ASSIGNMENT OF ERROR
INSOFAR AS THE ISSUE ADDRESSED IN THE SIXTEENTH ASSIGNMENT OF ERROR MAY HAVE BEEN WAIVED BY NOT HAVING BEEN RAISED BELOW, APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

"EIGHTEENTH ASSIGNMENT OF ERROR
A DEFENDANT WHO IS SENTENCED TO DEATH FOLLOWING A TRIAL AND MITIGATION HEARING IN WHICH HIS COUNSEL WAS DEFICIENT HAS BEEN DENIED HIS RIGHTS TO FAIR TRIAL AND DUE PROCESS AND IS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT, ALL AS SET FORTH IN THE FIFTH, SIXTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IN SECTIONS 1,2,5,9, 10,16, AND 20, ARTICLE I OF THE OHIO CONSTITUTION.

"NINETEENTH ASSIGNMENT OF ERROR
THE JURY AND THEN THE TRIAL COURT ERRED IN CONCLUDING, AND THIS COURT SHOULD NOT CONCLUDE, THAT THE AGGRAVATING CIRCUMSTANCE, THAT THE AGGRAVATED MURDER IN THIS CASE WAS COMMITTED IN THE COURSE OF AN AGGRAVATED ROBBERY AND THAT APPELLANT WAS THE PRINCIPAL OFFENDER IN THE AGGRAVATED MURDER, OUTWEIGHED THE MITIGATING FACTORS BEYOND A REASONABLE DOUBT.

"TWENTIETH ASSIGNMENT OF ERROR
THE SENTENCE OF DEATH WAS WRONGLY IMPOSED BECAUSE IT IS INAPPROPRIATE AND NOT PROPORTIONAL TO THE SENTENCE IMPOSED IN SIMILAR CASES.

We begin by considering appellant's first assignment of error.

In support of his first assignment of error, appellant argues that the trial court erred when it denied his request that his appointed trial counsel be withdrawn and that his trial be

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continued for ninety days to enable his family to hire private counsel. Appellant contends that a clear and absolute breakdown of the attorney-client relationship occurred when, against his wishes, his court appointed attorneys withdrew his plea of not guilty by reason of insanity and proceeded to trial on a plea of not guilty.

The Supreme Court of Ohio has ruled:

> "To discharge a court-appointed attorney, the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel." State v. Coleman (1988), 37 Ohio St.3d 286, paragraph four of the syllabus.

The question in this case, therefore, is whether there is evidence that such a breakdown occurred.

Appellant asserts that the record clearly shows that he wished to go to trial with a plea of not guilty by reason of insanity and that his appointed counsel withdrew the plea against his wishes and over his protest. Appellee responds that the statements made by appellant on the record leave some question that appellant objected to the withdrawal of the plea of not guilty by reason of insanity. Appellee further responds that absent a clear objection on the record from appellant, his counsel were free to make a tactical decision to withdraw the not guilty by reason of insanity plea and to proceed to trial on a straight plea of not guilty. This court has carefully examined the record which shows the following events occurred with regard to the plea of not guilty by reason of insanity.

On March 10, 1994, a written plea of not guilty by reason of insanity was filed for appellant in the Lucas County Court of Common Pleas. The trial court referred appellant to the Court Diagnostic & Treatment Center for a report on his competency to stand trial, pursuant to R.C. 2945.37 and for an evaluation pursuant to R.C. 2945.40.

On April 25, 1994, the trial court stated that it had received reports from the diagnostic and treatment center. The reports showed that appellant was competent to stand trial. The trial judge also stated that the reports indicated that appellant did not meet the criteria for a plea of not guilty by reason of insanity.[1] Appellant's counsel indicated they would still proceed with the plea of not guilty by reason of insanity.

On October 11, 1994, appellant was referred for a second competency evaluation following his attempt to commit suicide in jail. His appointed attorneys informed the court that they did not believe appellant could assist in his own defense due to his mental state.

On October 28, 1994, the trial court reported on the record that it had received the results of the second competency evaluation, and that appellant was competent to stand trial.[2] At the hearing on October 28, 1994, appellant first made statements on the record showing that he personally wished to pursue a defense based upon a plea of not guilty by reason of insanity, even if his counsel did not believe that was the best way to proceed.

Appellant made his statements in support of a pro se motion asking the trial court to permit his appointed counsel to withdraw and to grant him a ninety day continuance of his trial date so that he could obtain private counsel. When the trial judge asked appellant, on the record, his reasons for the motion, he told the trial judge:

> "Due to the nature of the possible death sentence, I wish to be represented by defense of not guilty by reason of insanity due to cocaine addiction. I am enclosing numerous letters I've written to my lawyer, ***, notifying him of my intent. There are certain legal and medical documents that will corroborate my defense.
>
> "Under my Constitutional rights to due process and effective assistance of counsel, I do not feel I can go forth with my scheduled trial if I am not adequately represented. By 'adequately' I mean as I was [sic] described above. ***"

He made further statements indicating that he wanted an insanity defense and that he wanted new counsel because he and his current counsel "have a difference in our defense ***." He explained that he believed he suffered brain damage due to cocaine use. He stated that he wanted an expert to testify on the issue of cocaine addiction and brain damage to support his insanity defense.

The trial judge asked appellant's appointed counsel if they had discussed possible defenses with appellant. When they said yes, the trial judge told appellant: "My strong suggestion is that you let them run the case, because they know what they're doing, instead of you run the case." The trial judge then denied

the motion filed by appellant, and appellant asked that his objection be noted for the record.

On November 1, 1994, appellant continued to make his wishes known regarding the plea of not guilty by reason of insanity. He again filed a pro se motion asking the trial court to permit his appointed counsel to withdraw and asking the trial court to grant a continuance of his trial date to permit him to hire private counsel. This time the pro se motion was written and was filed into the record. The motion states, in pertinent part:

> "Defendant makes this contention, because counsels [sic] have failed to consult in a meaningful manner with defendant about his theory of defense for the upcoming trial in the court.
>
> "Defendant wants to present an insanity defense to refute the intent element to the State's charge of aggravated murder."
>
> "Defendant's appointed counsels [sic] have failed to substantially investigate the insanity theory of defense. Going so far as to informing defendant's mother that Ohio has no provision for this defense under Ohio law! Defendant contends, that counsels [sic] have failed to take into account, that it is counsel's job to effectively assist him. So long as defendant's theory of defense is grounded in sound and correct jurisprudence, he's entitled to having this defense presented to a jury. The jurors being the ultimate 'trier of facts'."

The court addressed appellant on the record regarding the motion and denied the request.

On November 2, 1994, appellant again made his wishes known when his appointed counsel withdrew the not guilty by reason of insanity plea and entered a "straight not guilty plea

to the indictment and all the specifications." The trial judge approved the withdrawal of the not guilty by reason of insanity plea and began to address other matters. Appellant's appointed counsel interrupted and stated:

> "Excuse me, Your Honor. Before we go any further, Mr. Tenace has asked me to inform the Court that that's not his decision. However, we've made our decision as counsel and evaluating the strengths and weaknesses of that particular defense and decided to withdraw that defense."

The trial judge stated: "Is that correct, Mr. Tenace?" Appellant Appellant replied: "Yes, Your Honor." And the trial judge said: "We shall show it withdrawn."

Even after the trial began, appellant continued to raise the issue that he still wished to maintain a defense based upon a plea of not guilty by reason of insanity. Appellant asked the trial judge for permission to conduct cross-examination on a particular witness called by the prosecution. When the trial court denied his request, appellant stated:

> "Okay. I'd like to say this: Obviously, the defense that I wanted to present, my lawyers do see that it is of some value because they are planning to use that in mitigation. So, obviously, they see that it has some legal value. And again I want it noted that I object to this; that I wanted that defense from the beginning, the one that they're using from mitigation, I wanted this used during my trial. And I just want it noted that I object to this, again, and I'd like it on record."

Appellant again made a statement for the record showing that the plea of not guilty by reason of insanity was withdrawn against his wishes after he had an outburst in court during the

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cross-examination of his sister during the mitigation phase of the trial. Appellant stated, in part:

> "From the very beginning, I don't feel I'm being represented properly and I'm upset. I'm upset. From the very beginning, I notified these people that -- what defense I want. And it says in the law books that I have a right to do that, but yet I've been denied that right. That's why I'm upset."

This court finds, after reviewing the overall record associated with the entry and withdrawal of appellant's plea of not guilty by reason of insanity, that it is clear that the plea was withdrawn against appellant's wishes. We therefore consider the question of whether it was error for the trial court to permit appellant's counsel to withdraw the not guilty by reason of insanity plea against appellant's wishes.

Two appellate case are instructive regarding the issue we now consider. In the first case, the Ninth District Court of Appeals considered the specific question: "May counsel *** waive or withdraw defendant's plea of not guilty by reason of insanity over the objection of defendant himself?" State v. Turner (Sept. 17, 1980), Medina App. No. 963, unreported. The State v. Turner court ruled that such a waiver or withdrawal may not occur without the client's consent.

The facts in State v. Turner are quite similar to the facts in the case at bar. In State v. Turner the defendant's appointed trial counsel told the trial court he had secured clinical and medical reports regarding the defendant's psychiatric and psychological tests. He stated that on the basis of those reports, he would proceed to trial on a straight not guilty

plea. The defendant objected, on the record, to the withdrawal of his plea of not guilty by reason of insanity. The Ninth District Court of Appeals said:

> "The entering of any plea to the charges contained in an indictment is a fundamental act reserved to the province of defendant himself. It is always hoped that, after a full and complete discussion of the issues involved - both factual and legal, the defendant considers the historic role of the attorney as counselor and enters that plea not only most protective of his rights but reflective of the posture of the case against him. But in those instances where counsel's advice is rejected, the accused preserves always his right to risk the eventual verdict of court or jury and any punishment inflicted upon him as a result. It is his right to determine the primary question posed to him at arraignment: 'Shall I plead guilty, not guilty (and if the latter plea might raise also the question of my own mental culpability at the time of the commission of the crime with which I am charged) not guilty by reason of insanity? The professional duty of counsel in this sphere is to present defendant those choices available, to explain their meanings, and then, to abide by his client's choices. Defense counsel cannot decide himself the path to be chosen; he cannot waive one or more of the defenses once chosen by his client, or withdraw one or more of the pleas entered, without the consent of the person he represents." Id.

Appellee contends that a second case from the Eighth District Court of Appeals is more instructive. In the case cited by appellee, State v. Smith (1981) 3 Ohio App.3d 115, the Eighth District Court of Appeals of Ohio considered whether a trial court committed error when the trial court allowed a defendant's trial counsel to withdraw a plea of not guilty by reason of insanity without personally addressing the defendant to learn if that was the defendant's desire. State v. Smith (1981) 3 Ohio

App.3d 115. The Eighth District Court noted that there was "some uncertainty" regarding whether the decision to withdraw the not guilty by reason of insanity plea was a strategy decision or a decision within the exclusive control of the defendant.

The State v. Smith court cited to the ABA Standards Relating to the Administration of Criminal Justice, which provide that the decision of what plea to enter is to be made by the accused. The court stated that those guidelines are meant to apply only to a guilty or a not guilty plea. Id. at 118. The court acknowledged the ruling of the Ninth District Court of Appeals in State v. Turner (Sept. 17, 1980), Medina App. No. 963, unreported, and stated that even if that decision was presumed to be correct, it did not govern the case under consideration because one factor was different; in State v. Turner the defendant objected on the record to the withdrawal of the plea.

The Ninth District Court of Appeals then stated:

> "We hold that in the absence of any constitutional provision, statute, or court rule restricting defense counsel's authority to withdraw a plea of not guilty by reason of insanity, the trial court acts properly in accepting that withdrawal without personally discussing the matter with the defendant himself, at least when the record discloses no dissension from that decision by the defendant. " State v. Smith, 3 Ohio App.3d at 120. (Emphasis added).

As we have previously noted, in the case at bar, appellant did object on the record to the withdrawal of the not guilty by reason of insanity plea. For that reason, State v. Smith is distinguishable from the case at bar, and State v. Turner remains viable and persuasive.

Further research shows that in addition to the existing Ohio case law, an ethical consideration supports a ruling that error occurs when trial counsel is permitted to withdraw a plea over a client's recorded objection. Ethical considerations were adopted by the Supreme Court of Ohio as guidelines for the conduct of attorneys. EC 7-7 states:

> "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, <u>but it is for the client to decide what plea should be entered and whether an appeal should be taken.</u>" (Emphasis added)

The language used in EC 7-7 clearly states that a lawyer must advise a client whether a particular plea is desirable, but it is the client who makes the decision about what plea should be entered. The language is not restricted to informing a client about a guilty or a not guilty plea; it contemplates a discussion on any plea and on whether the lawyer deems the plea desirable.

Appellee contends that the decision to withdraw a plea of not guilty by reason of insanity and instead to enter a straight plea of not guilty constitutes a tactical decision that is in the providence of the trial attorney. However, research

conducted by this court shows that an attorney is free to make a tactical decision regarding what plea to enter only when a client does not choose to make the decision or does not object on the record.

In 1983, the United States Court of Appeals for the Seventh Circuit considered a habeas proceeding in which the defendant was complaining that his trial counsel withdrew a not guilty by reason of insanity plea. Weber v. Israel (7th Cir. 1984), 730 F.2d 499, certiorari denied 469 U.S. 850. The Weber court cited the discussion found in State v. Smith (1981) 3 Ohio App.3d 115, and ruled that in its case, the decision of trial counsel to withdraw a not guilty by reason of insanity was a tactical decision. Once again, however, the facts are distinguishable from the case at bar, because in Weber, the court noted that Weber "gave absolutely no indication that he disagreed with the withdrawal of the insanity plea or objected to the withdrawal in any manner." 730 F.2d 508.

Further research shows that other state and federal courts have ruled that when a client is found competent to stand trial, the client is also competent to decide what plea to enter, even if the client's choice does not follow the legal advice from trial counsel. For instance, an Arizona appellate court considered a case in which the defendant was found competent to represent himself. The trial court appointed advisory counsel to assist the defendant in presenting his case. State v. Favle (Ariz.App.Div. 1 1982), 658 P.2d 218.

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The advisory counsel repeatedly asked the trial court to permit him to present a complete insanity defense, even though the defendant had withdrawn the plea of not guilty by reason of insanity. The trial court permitted the advisory counsel to present a limited insanity defense within limits that the defendant agreed to accept. Id. at 223, 224. The defendant was convicted of assault with intent to commit murder and was sentenced.

The defendant then appealed, arguing that his trial counsel should have been permitted to pursue a full insanity defense, even though he would not consent to an insanity plea at trial. Id. at 221. The appellate court ruled that the wishes of the defendant regarding the insanity plea had to be followed when the defendant acted voluntarily and intelligently, even when the choices made were detrimental to the defendant. They quoted the following:

> "'Because the defendant must bear the ultimate consequences of any decision, we conclude that if a defendant has acted intelligently and voluntarily, a trial court must defer to his or her decision to waive the insanity defense.'" Id. at 229, quoting Frendak v. United States (D.C. 1979), 408 A.2d 364, 378.

The State v. Favle court went on to discuss some strategic reasons why a defendant might reject an insanity defense (does not want treatment; prefers prison to an insane asylum; believes killing was justified) and concluded that no error occurred when the wishes of the defendant regarding his insanity plea were honored by the trial court. State v. Favle, 658 P.2d at 229-230.

The Supreme Court of California also considered a case where a defendant made some choices, regarding a not guilty by reason of insanity plea, that his trial counsel advised were not the best tactical choice. People v. Medina (Cal. 1990), 799 P.2d 1282. The defendant in People v. Medina initially entered a not guilty by reason of insanity plea along with a not guilty plea. He subsequently withdrew the not guilty by reason of insanity plea. During the course of trial, he insisted on reinstating the plea of not guilty by reason of insanity, against his counsel's advice. He was convicted of murder and sentenced to death. Id. at 1300-1301.

The defendant in People v. Medina appealed, saying the trial court should not have permitted him to reinstate his not guilty by reason of insanity plea. The Supreme Court of California, sitting in bank, ruled that the decision of whether to plead not guilty by reason of insanity is personal to the defendant and the "trial court had no discretion to deny defendant's motion to reinstate his insanity plea solely because his counsel opposed that choice on tactical grounds." Id. at 1301.

Similarly, at least one federal circuit court has ruled that an attorney who abides by a client's decision not to enter an insanity plea has not rendered ineffective assistance of counsel. Alvord v. Wainwright (C.A.11, 1984), 725 F.2d 1282, certiorari denied 469 U.S. 956. The facts in Alvord v. Wainwright show that the defendant had previously been found not guilty by reason of insanity in Michigan. He was arrested in Florida for committing three murders and was found competent to stand trial.

He told his trial counsel he did not want an insanity defense. Instead, he insisted on asserting a weak alibi defense. Id. at 1286-1288.

Trial counsel complied with the defendant's instructions, and the defendant was found guilty and was sentenced to death. The defendant appealed, arguing he received ineffective assistance of counsel. Id.

The United States Court of Appeals for the Eleventh Circuit said: "*** given Alvord's competency, [his trial counsel] was ethically bound to follow his client's wishes." Id. at 1288. The court stated that if a client was so impaired he could not choose for himself what to do, the trial court should find the client was not competent to stand trial. Id. at 1289. The court found that the defendant received effective assistance of counsel. Id.

A petition for certiorari was filed from the decision of the United States Court of Appeals for the Eleventh Circuit. The United States Supreme Court denied the petition for certiorari. Two justices, Justice Marshall and Justice Brennan, dissented from the decision denying the petition for certiorari. Alvord v. Wainwright (1984), 469 U.S. 956.

In the dissent authored by Justice Marshall and joined by Justice Brennan, it was argued that the case should have been reviewed because the defendant's trial attorney did nothing to investigate the possible insanity defense available to his client or to persuade his client insanity was the best defense. Justice Marshall stated:

> "The question is whether counsel had a duty to investigate his client's case and make a minimal effort to persuade him to follow the only plausible defense. The question is not whether counsel has a duty to override his client's wishes, or pursue fruitless investigations, thereafter." Id. at 293 (Marshall, J. dissenting)

In referring to the decision from the lower court Justice Marshall stated:

> "The decision establishes that absolute deference to the uninformed reaction of a defendant is acceptable, and that counsel's decision not to pursue the issue and make an attempt to persuade his client is reasonable." Id.

Justice Marshall pointed out that a lawyer must be sure his client:

> "has access to information relevant to the pretrial and trial decisions that the accused must make himself, such as whether to testify on his own behalf, to waive a jury trial, or to plead guilty." Id.

Justice Marshall then stated:

> "Thus, if pursuit of an insanity defense is a decision to be made by the accused, it must be done on the advice of a well-informed attorney who has assured that his client has based his decision on relevant information." Id. at 294.

In footnote five, Justice Marshall acknowledged:

> "Ethical Consideration 7-7 of the American Bar Association Code of Professional Responsibility suggests that the decision on an insanity defense might ultimately be one for the client, but that it must be made after the lawyer has fully informed himself and his client on the issue." Id. at 295 fn.5.

The language contained in the EC 7-7 under consideration by the justices is the same as the language used in the EC 7-7 adopted in Ohio. The remarks of Justice Marshall, joined by Justice

Brennan, therefore indicate an acknowledgment that the power to make the decision regarding whether or not to enter a plea of not guilty by reason of insanity rests with the client.

We conclude, therefore, that once appellant was found competent to stand trial, he was also competent to make a decision regarding what plea to enter. Even if his trial counsel believed appellant's choice was not the best tactical choice, appellant's decision should have been final.[3] The trial court erred when it allowed appellant's appointed counsel to withdraw the plea of not guilty by reason of insanity even though appellant objected on the record.

A final issue to consider is appellee's contention that even if error did occur, the error was harmless. Crim.R. 52(A) defines harmless error as:

> "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." (Emphasis added).

We cannot find that harmless error exists in this case, because the right of a defendant who is competent to stand trial, but who insists he was insane at the time of the crime, to choose what plea to enter is a substantial right.

As the Ninth District Court of Appeals for Ohio noted in State v. Turner (Sept. 17, 1980), Medina App. No. 963, unreported, prejudice occurs when a court allows trial counsel to withdraw a plea of not guilty by reason of insanity over a client's objection because the client is deprived "of the opportunity of presenting testimony relating to his chosen defense."

Id. The Ninth District Court of Appeals expounded further, stating:

> "In ruling as we do, we recognize that the psychiatric evidence elicited, if any, from the professionals contacted by defendant's attorney might well not be beneficial to defendant's cause. This fact, however, does not lessen defendant's right to enter his chosen plea. Factually, the testimony of the expert witnesses may not have been used at all; the defendant himself could have testified concerning his thought processes at the time of the incidents which gave rise to the indictments against him." Id.

We therefore conclude that in this case a breakdown occurred in the attorney-client relationship that was of such magnitude, appellant was deprived of the right to effective assistance of counsel. The trial court erred when it permitted trial counsel to make a decision that is reserved to a competent client; what plea will be entered to the charges brought against the client. The error affected a substantial right and is, therefore, not harmless. Appellant's first assignment of error is well-taken.

The remaining assignments of error are rendered moot by our disposition of the first assignment of error. The judgment of the Lucas County Court of Common Pleas is reversed, and this case is remanded for further proceedings consistent with this decision. Appellee is ordered to pay the court costs of this appeal.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 7/1/92.

Peter M. Handwork, J. _____ JUDGE

George M. Glasser, J. _____ JUDGE

James R. Sherck, J. _____ JUDGE
CONCUR.

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[1]The trial judge stated on the record that these findings from the report were admitted into the record. The report therefore contains the findings, but not the physical report, which was not marked as an exhibit or filed in the record.

[2]Once again, the trial judge stated on the record that these findings from the report were admitted into the record. The report therefore contains the findings, but not the physical report, which was not marked as an exhibit or filed in the record.

[3]ABA Standards for Criminal Justice Standard 4-5.2 indicates that when an attorney and a client have a disagreement on significant matters of tactic or strategy, the lawyer should make a record of the differences and of the conclusion reached, while preserving confidentiality.

The Supreme Court of Ohio

FILED

DEC 11 1997

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

1997 TERM

State of Ohio,
Appellant,

v.

Troy Matthew Tenace,
Appellee.

Case No. 97-1887

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Furtherance of Justice Fund.

(Lucas County Court of Appeals; No. L95010)

THOMAS J. MOYER
Chief Justice

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